

Supreme Court, U. S.

FILED

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MICHAEL BODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-1299**

91.90 ACRES OF LAND, SITUATE IN MONROE COUNTY, MISSOURI, and
WALSH REFRACTORIES CORPORATION, C-E REFRACTORIES AND
COMBUSTION ENGINEERING, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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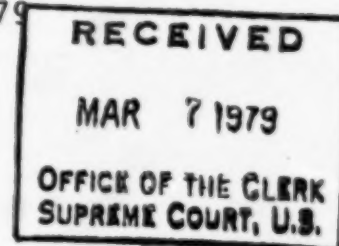
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March 5, 1979



Mr. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
Washington, DC 20543

RE: 91.90 Acres of Land, Etc.,
et al. v. United States of
America, Supreme Court of the
United States, Case No. 78-1299

Dear Mr. Rodak:

While reviewing our copy of the printed Petition for Writ of Certiorari in the above captioned case, I discovered three errors in citations which creates some unnecessary confusion.

On page 12, line 14, the local citation to United States v. 91.90 Acres of Land, Etc., "supra 80" should be "supra 88".

The local citation to United States v. Miller, "supra 281", on line 11 of page 14 of the Writ should read "supra 376".

Finally, the reference to "(T-28)" on page 19, line 13 should be corrected to state "(T-228)".

Would you please take note of these errors and the applicable corrections. I am enclosing 40 copies of this letter so that they may be placed with the printed Petition for Writ of Certiorari. Please accept my apologies for any inconvenience which may have occurred as a result of these errors.

With best regards, I am

Very truly yours,
ORIGINAL SIGNED BY
LOUIS J. LEONATTI
ATTORNEY AT LAW
LOUIS J. LEONATTI

LJL/lc
cc: Mr. Edwin B. Brzezinski
Mr. James W. Moorman
Attn. Jacques B. Gelin and
Maryann Walsh
The Honorable Wade H. McCree, Jr.

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WALSH REFRACTORIES CORPORATION, C-E REFRACTORIES AND
COMBUSTION ENGINEERING, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Eighth Circuit

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on November 6, 1978; petition for rehearing was denied on December 11, 1978; and petition for rehearing en banc was denied on December 6, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 586 F.2d 79.

A copy of the Court's opinion is reproduced as Appendix A hereto.

The Court of Appeals entered an order denying Petitioner's petition for rehearing (Appendix B) and denying the petition for rehearing en banc (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was made and entered on November 6, 1978, (Appendix A). The petition for rehearing was denied on December 11, 1978, (Appendix B); the petition for a rehearing en banc was denied on December 6, 1978, (Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Did the Eighth Circuit Court of Appeals err in its finding that the trial judge was guilty of "plain error":

I

In permitting C-E's value witnesses to use "unit-times-price" as a method of arriving at the value of a clay strip mine? The weight of authority is that this is a proper method of determining the before and after value of land underlaid by a mineral deposit.

II

In permitting C-E's value witnesses to show how the government's taking of sixty-five (65%) percent of the tract caused costly revisions in the mining plan and a loss of clay which

diminished the fair market value of the remaining tract? The weight of authority is that such evidence of severance damages is admissible.

III

In purportedly allowing C-E's value witnesses to ignore the surface value of the remaining tract in arriving at their estimate of the fair market value after the taking? The record shows the surface value of the land was included in the appraisers' after value testimony.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V, which provides: ". . . nor shall private property be taken for public use, without just compensation."

STATEMENT

On December 16, 1976, the date of taking, Petitioner, herein-after referred to as "C-E", owned 140 acres of land in Monroe County, Missouri. (T-24) This tract contained a deposit of "ladle clay". (T-47, 449) This clay expands, rather than shrinks, when it is exposed to intense heat. (T-25, 449, 482) It is a component of refractory products and is a basic ingredient of brick used to line ladles that transport molten metals and molten glass. (T-83) Ladle clay is extremely rare. (T-25, 26, 61, 165, 479, 504) The deposit of ladle clay on C-E Refractories' 140 acres in Monroe County is the only known deposit of ladle clay in the State of Missouri. (T-83, 84, 129, 448, 449)

On the date of taking, the United States took title to 87.89 acres of the 140 acre tract in fee and it acquired a perpetual flowage easement over 4.01 acres. The entire "ladle clay" de-

posit is located under the 48.10 acres which C-E retained after the taking. (T-84, 115, 116) The land condemned is to be used by the government in connection with the construction of the Clarence Cannon Dam and Reservoir Project.

Mr. Stig Scharthi, the Petitioner's plant manager, testified that there are 327,617.52 tons of ladle clay on the tract of land. (T-36) He stated that the value of the clay in the ground on the date of taking was One and 95/100 (\$1.95) Dollars per ton. (T-35) He testified as to C-E's plan for mining the clay before the taking and how this plan had been revised after the taking. (T-35, 36) In order to remove the clay after the taking in compliance with various state and federal laws, the company must construct a moat, four (4) collection ponds to collect surface water runoff, three (3) settling ponds, a roadway, supporting equipment, pumps, and fencing. In addition, the overburden from this strip mine must be transported to another location. Before the taking, the overburden could have been pushed into the ravines which are now subject to the flowage easement and on to the back part of the property, which is the 87.89 acre tract taken in fee. (T-34, 35, 36, 37, 38, 42, Defendant's Exhibit B) This would have been a very economical method of mining the clay and would have minimized any clay loss through contamination. (T-149) The overburden pushed onto the 87.89 acre tract taken would have provided a natural dam to prevent runoff into the stream. (T-42) The overburden pushed into the ravines would have acted as fill, which would have leveled the land. (T-35) Because of the taking, all mining must be done within the confines of the remaining 48.10 acres. In order to mine the ladle clay from this tract, C-E was required to devise a new mining plan. The plan would cause C-E to lose 44,000 tons of clay. (T-41) According to Mr. Scharthi, the total loss resulting from the taking of the land, the imposition of the flowage easement, the loss of clay and the modifications in the plan for mining the clay was Five Hundred Forty Thou-

sand Ninety-seven and 21/100 (\$540,097.21) Dollars. (T-43-44)

Four real estate value witnesses called by C-E testified to the before and after value of the land. The Court of Appeals singled out the testimony of Wayne C. Miller as representative of the Petitioner's method of valuation. [*United States v. 91.90 Acres of Land, Etc.*, 586 F.2d 79, 84 (8th Cir. 1978); Appendix A, p. A-13]

Mr. Miller testified that there had been no sales of other clay properties in the area in the last twenty (20) years. (T-170, 171, 179) Mr. Miller valued the total tract at Seven Hundred Forty-six Thousand Ninety-two and 41/100 (\$746,092.41) Dollars. (T-181) He explained that in arriving at this value he considered the fair market value of the surface of the land to be One Hundred Forty Thousand and no/100 (\$140,000.00) Dollars. (T-180) He placed a value on the clay in the ground at One and 85/100 (\$1.85) Dollars per ton. (T-182) The value he placed on the remaining land after the taking and after the deduction of severance damage was One Hundred Ninety-nine Thousand One Hundred Sixty-two and 85/100 (\$199,162.85) Dollars. (T-182) The total damage to the property was Five Hundred Forty-six Thousand Nine Hundred Twenty-nine and 56/100 (\$546,929.56) Dollars. (T-182) Of this damage, Eighty-one Thousand Six Hundred Ninety-two and 63/100 (\$81,692.63) Dollars represents the actual loss of clay. (T-183)

The government called Dr. William J. Lang of Libertyville, Illinois as its expert on clay mining. (T-254) It was his opinion that the total property had a highest and best use as a clay mine. (T-298) He stated on direct examination that clay in the ground, located, opened up, stripped, so it is an operating mine, has a value of One and 85/100 (\$1.85) Dollars per ton. (T-304) He accepted the fact that there were 300,000 tons of clay under the land in question. (T-338)

Mr. Kniffen was called by the government as a real estate appraisal witness. (T-396) He testified that the damage to C-E as a result of the taking was Thirty-one Thousand Two Hundred and no/100 (\$31,200.00) Dollars. (T-401) He valued the surface of the land at Three Hundred Fifty and no/100 (\$350.-00) Dollars per acre. (T-411) He placed no value on the clay since Dr. Lang told him that no clay was taken and the mining of the clay would not be impaired by the taking. (T-411) It was his opinion that the highest and best use of the tract was as a clay mine. He could find no comparable sale of property containing clay in the area or in the counties surrounding the area. (T-422, 423) Neither could Mr. McReynolds, the government's other real estate appraisal witness. (T-386)

Evidence of the damage which C-E incurred as a result of the taking was supported by the testimony of Dr. Walter Keller, who Dr. Lang conceded was one of the foremost geologists in the world, (T-333), and Mr. Robert Turner, who for the past twenty-eight (28) years was mining superintendent for A. P. Green Firebrick Company, one of the biggest manufacturers of firebrick in the world. (T-146)

The jury by its verdict established C-E's damage at Two Hundred Forty-five Thousand Nine Hundred Sixty-six and no/100 (\$245,966.00) Dollars. (T-551)

REASONS FOR GRANTING THE WRIT

I

Unit-Times-Price Method of Evaluation

The Court of Appeals has stated that it is plain error to have testimony which separates the value of minerals, which underlays land, from the surface value of the land. This is often referred to as the "unit-times-price" method of evaluation. There are conflicting opinions throughout the United States on the proper method of evaluating minerals which are located beneath the land's surface [See 40 ALR Fed. 686-692 (1978)] This conflict should be resolved by the Supreme Court so that the rule in federal condemnation cases is uniform. The rule should also be made applicable in situations involving improved real estate in which the same dilemma occurs because the evidence required to prove such loss has not been established by this Court.

The Eighth Circuit in our C-E case has said:

... the landowner is not entitled to have the surface value of the land and the value or underlying minerals aggregated to determine market value.

... it is generally not permissible to determine the value of a mineral deposit by estimating the number of tons in place and then multiplying the tonnage by a unit price per ton. [*United States v. 91.90 Acres of Land, Etc.*, 586 F.2d 79, 87 (8th Cir. 1978); Appendix A, p. A-19]

This, the Court of Appeals states, is supported by two Eighth Circuit decisions which are *United States v. 599.86 Acres of Land, Etc.*, 240 F.Supp. 563, 572-573, (WD Ark 1965), aff'd sub nom *Mills v. United States*, 363 F.2d 78 (8th Cir. 1966). However, we do not read either of these decisions as supporting

this position. This method of evaluation was not used in these cases because there was no showing that there was a market for the coal the landowner claimed was under his land. A necessary ingredient of the unit-times-price method, is an established market price. Without this ingredient, its use will result in speculation. This is precisely what these two cases say. However, the Court of Appeals in our C-E case has interpreted this rule to mean that any use of the unit-times-price method of evaluating mineral deposits will always result in speculation. We feel this is erroneous.

The Eighth Circuit in our C-E case has also inferred that this same rule would be applied in the case of improvements on land. However, the case of *United States v. Bechtold Co.*, 129 F.2d 473, (8th Cir., 1942), citing a New York case with approval, states:

'But when a building has an intrinsic value, which must be added to the value of the land in order to ascertain the value of the whole, the owner may not be able to establish his just compensation unless he is permitted to prove the value of his land as land and the value of his buildings as structures. By adding to each other these two quantities the result is really the value of the land as enhanced by the buildings thereon.' [Headnote 13, id at 478-479]

The same rule was followed by the Court of Appeals for the Eighth Circuit in *Clark v. United States*, 155 F.2d 157 (8th Cir. 1946). The Court stated:

We think it was prejudicial not to permit defendants' witness to tell the jury what part of the value he placed on the timber land and what part on the rest of the land. In eminent domain proceedings the rule is that all facts which an ordinarily prudent man would take into account before forming a judgment as to the market value of property he contemplates purchasing is relevant and material. The land-

owner should be allowed to state and to have his witnesses testify to every fact concerning the property which he would normally or ordinarily be disposed to put forth in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. He was entitled to present to the jury all the elements reasonably affecting the value of the property for all uses for which it was suitable. (id at 162)

Then citing a United States Court of Appeals decision in the District of Columbia on this same proposition, the court stated:

In *National Brick Co. v. United States*, 76 U.S.App. D.C. 329, 131 F.2d 30, 31, the trial court rejected testimony as to the value of sand contained on the land taken. In reversing the case the court, among other things, said: 'Obviously, the Court was originally of opinion that the presence on the property of the sand bank forty to ninety feet high, containing 300,000 cubic yards of pure sand was of no consequence in determining the value of the property taken, and that the added value by reason of the presence of the sand should not be considered. On this theory most of the evidence of the additional value of the sand in the bank as it was and of the additional value of the property by reason or presence of the sand was rejected.

'This opinion of the Court was, of course, wrong, for no rule is better established than that the special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled to have considered in determining the amount to be paid in just compensation. (*Mitchell v. U. S.*, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644.)

'... And we know of no other evidence by which the jury could be properly guided in determining the value

of the property than to be told the per ton value of the sand as it lay, or, without this knowledge, how the jury could ever have reached a judgment based on anything more than guess or speculation.'

We think the rejection of this proffered evidence was prejudicial error. [id. at 162]

We believe these decisions state the proper valuation rule and the established law in the Eighth Circuit at the time our C-E case was tried. Although the Court of Appeals in our C-E case has not referred to either of these Eighth Circuit decisions or the decision in *National Brick Co.*, supra, by its decision it has overruled the legal principles of these cases.

The rule of the Eighth Circuit before the C-E decision is strongly supported in the Fourth Circuit in the case of *Cade v. United States*, 213 F.2d 138, 142 (4th Cir. 1954):

The trial judge was correct in thinking that the property should be valued as a whole for the purpose of assessing compensation for the taking; but this does not preclude the admission of testimony showing particular elements of value for consideration by the jury in arriving at the overall value which they are required to find as the basis of compensation. The value of a rock deposit, like the value of a coal mine or an oil well or a building may properly be shown as bearing upon the value of the property being taken, even though the measure of recovery is the overall value of the property. In no other way would it be possible adequately to apply the well settled rule that the most profitable use to which the land can reasonably be put in the reasonably near future may be shown and considered as bearing upon the market value. See *McCandless v. United States*, 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205; and opinion of this court in *United States ex rel. Tennessee Valley Authority v. Powelson*, 4 Cir., 138 F.2d 343 and cases there cited.

The 1966 District Court of Virginia case of *United States v. 180.37 Acres of Land, Etc.*, 254 F.Supp. 678 (W.D. Va. 1966), notes that the unit-times-price method was proper in valuing land underlaid with a coal deposit where there were no comparable sales. The court notes any other basis would have resulted in an arbitrary guess as to valuation.

The unit-times-price method was also approved in the Sixth Circuit in *United States v. 2847.58 A. of Land, More or Less, Etc.*, 529 F.2d 682 (6th Cir. 1976); in the District Court of Pennsylvania, *293.080 Acres of Land, Etc. v. United States*, 169 F.Supp. 305 (W.D. Pa. 1959); in the District Court of Delaware, *United States v. 1,629.6 Acres of Land, Etc., State of Del.*, 360 F.Supp. 147 (D. Del. 1973); and in the District of Columbia in *United States v. 237,500 Acres of Land* (1964 D.C. Cal.), 236 F.Supp. 44 (S.D. Calif. 1962), aff'd (CA 9 Cal. 1968), 404 F.2d 336.

The clay deposit involved contained very rare ladle clay. C-E was using this clay in the production of refractory products, which include firebrick and liners for ladles. There is a present need for this product and its use will continue and increase in the future. (T-33, 34, 498) Since it is the only known deposit of this type clay in Missouri, there are no comparable sales to use as a measuring rod of value. (T-83, 84, 129, 448, 449, 170, 171, 179, 203, 218, 227, 386, 422, 423)

" . . . Where for any reason property has no market resort must be had to other data to ascertain its value . . . " *United States v. Miller*, 317 U.S. 369, 374 (1943).

In the case of minerals in place, what is the test if the unit-times-price method is not available? The Court of Appeals in our C-E case did not tell us this. In the *National Brick Co.* case, supra, the court said:

" . . . we know of no other evidence by which the jury could be properly guided in determining the value of the

property than to be told the per ton value of the sand as it lay, or, without this knowledge, how the jury could ever have reached a judgment based on anything more than guess or speculation. (*supra* at 30, 31)

The Court of Appeals in our C-E case tells us:

. . . we think there was substantial competent evidence to justify the jury in making a before and after market value award substantially in excess of the amounts testified to by the government's value witnesses. [*United States v. 91.90 Acres of Land, Etc.*, *supra*, 88; Appendix A, p. A-21]

The court did not tell us what the substantial competent evidence was. It did tell us that the unit-times-price method is "simply too speculative to be permissible." (*United States v. 91.90 Acres of Land, Etc.*, *supra*, 80; Appendix A, p. A-22) Without some guide, this negative approach to the evaluation of a mineral deposit leaves us adrift without a paddle.

Certainly the purchaser of a mineral deposit wants to know how much there is, the cost to remove and transport it to a plant or market, and what the market price for this particular material will be. In a strip mine, the surface land is only incidental in determining if it is sufficient to accommodate the overburden and to permit storage of equipment and mined materials. With these elements in mind, the before fair market value is determined. A jury has a right to know the factors considered by the expert in arriving at value estimates. Without this, the jury would be handed a roving commission and must base its judgment on guess or speculation. (*National Brick Co. v. United States*, *supra*, at 31)

Presumably, the Court of Appeals has said you can tell the jury that the highest and best use of the property is a clay mine. Your value witnesses can give their opinion of the value before the taking and the value after the taking, but they can't say anything more. If they tell the jury the basis of their opinion,

that will be plain error because they have violated a nonsensical rule which says their reasoning may not be explained. By merely stating the highest and best use and the before and after value, this, according to the Court of Appeals, will:

. . . lead the jury *permissibly to infer* that before the taking a reasonable seller would ask more for the overall property due to the clay deposit, and that a reasonable buyer would pay more on account of the deposit. (*United States v. 91.90 Acres of Land, Etc.*, Headnote 17, *supra* at 88; Appendix A, p. A-22)

This then suggests the jury should be given a roving commission to determine the value of land underlaid with a mineral deposit.

The Appellate Court was obviously in error. This error, which is also contained in several other decisions noted in 40 ALR Fed. 686-688 should be corrected now.

The test which the court should adopt to clarify this dilemma is the unit-times-price rule. This rule must have a foundation of reasonable engineering estimates of quantity and a current market that is reasonably likely to continue in the future.

II

Factors Affecting the After Value

The Fifth Amendment to the United States Constitution guarantees each citizen that his property will not be taken for a public use without just compensation.

Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good condition *pecuniarily* as he would have occupied if his property had not been taken. (emphasis added) *United States v. Miller*, 317 U.S. 369, 373 (1943).

Often a taking does not involve the acquisition of the entire ownership. When a partial taking occurs, just compensation must include any depreciation in the value of the land remaining after the severance has occurred. Mr. Justice Roberts, speaking for this court, stated:

If only a portion of a single tract is taken the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage. (*United States v. Miller*, supra, 281.)

The rule for determining damages is stated in *Bauman v. Ross*, 167 U.S. 548 (1897):

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. (Id at 574)

'In estimating the damages, the committee are not confined to the value of the land covered by the road, and the expense of fencing the ground. The owner may suffer much greater damage by the road depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious; . . .' (Id at 575, 576)

C-E owned 140 acres of land in Monroe County. After the taking, C-E was left with 48.10 acres in the tract. (T-84, 115, 116) This tract was extremely valuable to C-E because it contained a rare deposit of ladle clay. (T-25, 26, 61, 165, 479, 504) Drill records and computations by Petitioner's plant manager indicated the tract contained 327,617.52 tons of ladle

clay. (T-32, 33, 36) This is the only known deposit of ladle clay in Missouri. (T-83, 84, 129, 448, 449) For years, another firebrick company has searched for this type clay without success. (T-83, 151, 478)

Before the taking, C-E had a plan for mining the tract which utilized the entire 140 acres. (T-35, 36). As a result of the taking by condemnation, the mining plan had to be revised. (T-35, 36) In order to revise the plan so that the maximum amount of clay could be removed from the tract after the taking, a loss of 44,000 tons of clay would occur. (T-41) In order to strip mine the clay in the limited area remaining, C-E's engineers determined that it must construct a moat, settling ponds with supporting equipment and pumps, a roadway and a fence. In addition, the overburden, which could previously have been pushed into ravines and onto the 115.99 acres on which no clay was located, must now be transported to other locations on the tract at an additional cost. (T-36, 37, 38, 42) C-E had little choice. It could either expend the sums necessary to mine its only deposit of ladle clay or go out of the business of producing brick which requires this clay as a basic ingredient.

Both sides of the case agreed that the highest and best use of the property is as a clay mine. (T-49, 171, 203, 217, 227, 298, 385, 422) Consequently, one would ask, wouldn't a willing buyer of the remainder of this property consider the loss of 44,000 tons of clay, the construction of a roadway and moat, the settling ponds and a fence, and the cost of shifting the overburden in determining what such buyer would pay for the property? And, wouldn't a willing seller consider the mining problems which present themselves after the taking in determining the sales price of the 48.10 acres? These certainly are factors which affect the value of this land. However, the Appellate Court in C-E tells us we are not entitled to be compensated for these losses since they did not result from the

taking but from C-E's decision to continue mining the clay from the 50 acre tract and to do it in a certain way. (*United States v. 91.90 Acres of Land, Etc.*, Headnote 14, supra at 88; Appendix A, p. A-22) However, in the next breath the court states:

. . . C-E was entitled to show that the deposit of clay could be mined more efficiently if the 90 acres that the government took were available for utilization in connection with the mining operation. Such evidence might well lead the jury *permissibly to infer* that before the taking a reasonable seller would ask more for the overall property due to the clay deposit, and that a reasonable buyer would pay more on account of the deposit; and a jury might *permissibly infer* that after the taking of the 90 acres the 50 remaining acres, including the 20 acres of clay, were worth less standing alone than they were worth as part of the larger original tract. (*United States v. 91.90 Acres of Land, Etc.*, Headnote 17, supra at 88; emphasis ours; Appendix A, p. A-22)

We believe the court's opinion in C-E is in conflict with itself. If the jury is not told how the damage to the remaining portion of the tract occurred, what evidence will ". . . lead the jury permissibly to infer that before the taking a reasonable seller would ask more for the overall property . . ." and after the taking the property standing alone would be worth less? (Id at 88)

This matter has been considered in two state court opinions. In *Southern P. R. Co. v. San Francisco Sav. Union*, 79 P. 961, 962-963 (Cal. 1905), the court said:

. . . there is no doubt that . . . it may be much more expensive for him to take them (minerals) out; . . . and it may be that much valuable mineral would have to be left . . . evidence of all these matters would be submitted to

the court and jury and would enter as substantial factors in determining the value of the easement. (emphasis added).

In *Seattle & M. R. Co. v. Roeder*, 70 P. 498, 501 (Wash. 1902), the court stated:

. . . evidence is admissible to show that the most advantageous way to work the quarry is by blasting, which will be rendered more difficult and more expensive by the proximity of the railroad.

The United States admits that C-E is entitled to severance damages. In its initial brief in the Court below on Page 12 it states:

Because the United States acquired less than C-E's entire acreage, C-E is clearly entitled to certain severance damages.

The matter has been previously considered in the Eighth Circuit in the case of *United States v. 403.14 Acres, Etc. in St. Clair County, Missouri*, 553 F.2d 565, 567[2] (8th Cir. 1977). The court, in considering severance damages, stated:

'[O]f course, in determining that value the finder of fact will take into consideration all factors of value that would influence a reasonable seller and a reasonable buyer in negotiating a separate sale of the property that was left to the former owner after the taking.

The required change in the mining operation of this rare deposit of clay is an element of severance damage and it was error for the court to overrule the previous decisions which established this by stating "these consequential damages are simply not compensable and evidence of them should have been excluded." (*United States v. 91.90 Acres of Land, Etc.*, supra at 88; Appendix A, p. A-22)

III

Surface Value of the Land

The Court of Appeals in our C-E case at Page 88, [Headnote 15 App. A, p. A-22] stated that the value witnesses for C-E ignored the surface value of the remaining 50 acres of land immediately after the taking. It is apparent from reading the testimony of all of the witnesses that this interpretation of the testimony of the value witnesses called by C-E is erroneous. Each of the witnesses called as value witnesses clearly stated a before value, which included the clay deposit in the ground, and an after value, which was diminished by the witnesses' estimate of the severance damage which occurred as a result of the taking. Each value witness heard Mr. Scharthi, Mr. Porter and Dr. Keller testify concerning the value of the clay deposit in the ground and the loss of clay and additional mining costs which C-E would incur as a result of the taking. (T-33, 35, 36, 43, 83, 103, 104, 114, 218, 227, 228) Mr. Scharthi testified the grand total of these when totaled with the value of the land taken, amounted to a loss of Five Hundred Forty-Thousand Ninety-seven and 21/100 (\$540,097.21) Dollars. (T-43) Each value witness was a qualified real estate broker and appraiser. Each expressed his opinion of the surface value of the land. (T-168, 170, 181, 199, 209, 216, 219, 227)

Mr. Miller, and the other land appraisal witnesses, considered the total value of the land before the taking. In Miller's opinion, this before value was Seven Hundred Forty-six Thousand Ninety-two and 41/100 (\$746,092.41) Dollars and the value after the taking was One Hundred Ninety-nine Thousand One Hundred Sixty-two and 85/100 (\$199,162.85) Dollars. (T-181, 182) The after value given by Mr. Miller included the remaining land. In explaining his total damage figure, Mr. Miller stated: "This is the severance damage and the value of the land that was taken and the loss of clay." (T-182) It should be specifically noted in

Mr. Young's testimony his damage figure considered only the loss of 87.89 acres in fee and 4.01 acres for perpetual flowage easement. (T-204) The same considerations were used by Mr. Colbert (T-220) and Mr. Ridgley (T-228). The specific question put to Mr. Ridgley was:

Q: Now, have you, using the comparable sales approach, as to the land, and by using this [sic] values you have received from these experts and what you have heard in this courtroom, arrived at a value of the land immediately after the date of taking?

A: Yes, sir.

Q: What is that value?

A: \$195,495.20. (T-28)

This value testimony certainly included the surface value of the remaining 48.10 acres after the taking. The before value, after value and damage testimony is the composite the Court of Appeals seems to require. However, in this instance it is critical because the surface land and the remaining value of the clay are not stated separately.

CONCLUSION

A writ of certiorari should issue when the question to be decided is fundamental to the further trial of the matter. The case of *United States v. General Motors Corp.*, 323 U.S. 373 (1945), involved a condemnation proceeding by the government to procure the temporary use of a building which was occupied by the defendant under a long-term lease. General Motors offered to prove various items of cost caused by its loss of the premises. Its offer of proof was denied by the District Court. The Seventh Circuit Court of Appeals held that this was admissible evidence. In the order granting the writ of certiorari, this Court stated:

We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case. (Id at 377)

This was also a case of first impression in the Supreme Court and there was a conflict in the decisions of the Circuit Courts of Appeal.

It is essential at this time that this court establish the rule for determining the value of minerals which underlay land and the method of determining consequential damages. The decision in our C-E case is in direct conflict with other Appellate Court decisions in the Eighth Circuit as well as decisions in other circuits and districts of the United States. The opinion in our C-E case has the effect of overruling those cases which have established a workable method of determining the value of minerals in the ground and consequential damages in the case of a partial taking of land. There is a need that the matter be clarified and that the rules be fixed as a guide for courts, counsel and juries in the trial of condemnation cases.

Respectfully submitted,

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APPENDIX

APPENDIX A

**United States of America,
Appellant,**

v.

**91.90 Acres of Land, Situate in Monroe County, Missouri, and
Walsh Refractories Corporation, C-E Refractories
and Combustion Engineering, Inc.,
Appellees.**

No. 77-1944.

**United States Court of Appeals
Eighth Circuit**

Submitted Sept. 12, 1978

Decided Nov. 6, 1978

In an eminent domain case, the United States District Court for the Eastern District of Missouri, John F. Nangle, J., entered judgment on a verdict finding that the landowner was entitled to compensation in the sum of \$245,966. After a post-trial motion for a new trial or, alternatively, for a large remittitur was denied, the Government appealed. The Court of Appeals, Henley, Circuit Judge, held that: (1) where consequential damages to the landowner did not result from the taking but from the landowner's decision to continue to mine clay and to do it in a certain way, the damages were not compensable and evidence of them should have been entirely excluded; (2) the district court committed serious error when it permitted an aggregation of the estimated surface value of the 140-acre tract immediately prior to the taking and of the landowner's estimate as to the value of the clay underlying 20 of the 48.1 acres of land that

were not taken and when it ignored completely the surface value of the remaining 48.1 acres immediately after the taking; (3) the district court erred when it permitted the landowner's managerial personnel to make estimates of tonnage of clay in the ground and then multiply that tonnage by a fixed unit price, and (4) where the district court fell into plain and fundamental error in connection with the evidence and the instructions and it was impossible to determine the extent to which the jury considered incompetent evidence or accepted an improper method of valuation in arriving at its award, a new trial was necessary regardless of whether the Government's trial counsel made timely and proper objections to the landowner's evidence and regardless of whether the Government's trial counsel requested proper instructions or objected to the instructions given by the trial court.

Reversed and remanded.

1. Eminent Domain Key 122

Where the Government in the exercise of its power of eminent domain condemns for public use the property of a person, including a corporation, the property owner is constitutionally entitled to just compensation. U.S.C.A.Const. Amend 5.

2. Eminent Domain Key 124, 131

Just compensation to a property owner for the property or estate taken by the Government in the exercise of its power of eminent domain is generally measured by the fair and reasonable market value of the property or interest taken, as of the date of the taking.

3. Eminent Domain Key 136

Where the Government condemns only part of a single holding, just compensation is to be measured by the difference be-

tween the fair and reasonable market value of the entire ownership immediately before the taking and the fair and reasonable market value of the portion not taken immediately after the taking.

4. Eminent Domain Key 138

In cases of partial takings, it is incorrect to think of "severance damage" as a separate and distinct item of just compensation apart from the difference between the market value of the entire tract immediately before the taking and the market value of the remainder immediately after the taking.

5. Eminent Domain Key 219

In the case of a partial taking, if the issue of just compensation is submitted to the jury in terms of the difference between the fair and reasonable market value of the entire tract immediately before the taking and the fair and reasonable market value of the portion not taken immediately after the taking, there is no occasion for lawyers or court to talk about "severance damage" as such and, indeed, it may be confusing to do so.

6. Eminent Domain Key 131, 136

A landowner whose property is condemned in whole or in part is entitled to the full and perfect equivalent in money of the property or estate taken and this equivalent is measured by the concept of fair and reasonable market value.

7. Eminent Domain Key 131

The "fair and reasonable market value" of a tract of land, for purpose of determining just compensation to condemnee, is that price which a reasonable seller who desires to sell but is not required to sell would demand for the property and the price

which a reasonable buyer who desires but is not required to buy would pay for the same, assuming a reasonable time for negotiations and explorations of alternatives.

8. Eminent Domain Key 134

A landowner is entitled to have the market value of his property determined by reference to the highest and best use for which it is available and for which it is plainly adapted.

9. Eminent Domain Key 131

In a condemnation proceeding, landowner is entitled to have the fact finder take into consideration all factors of value that would affect the market value of the property; however, landowner is not entitled to have all factors affecting the value of his property added together and the total taken as the reasonable market value of his land.

10. Eminent Domain Key 133

Though improvements on a farm are an element or factor of value that must be considered in determining what the farm is worth on the market, for purpose of determining just compensation in a condemnation proceeding, one does not value the land as one factor and the improvements as another factor and then add the two values to determine market value; the value of the improved property may be greater than, equal to, or even less than the property in its unimproved state.

11. Eminent Domain Key 134

In the case of land that is underlaid with marketable minerals, including plastic clay, the existence of those minerals is a factor of value to be considered in determining market value of the property, for eminent domain purposes; however, the landowner

is not entitled to have the surface value of the land and the value of the underlying minerals aggregated to determine market value and the value of the mineral deposit is to be considered only to the extent to which it enters into and affects the overall market value of the property.

12. Eminent Domain Key 134

For purpose of determining just compensation for land that is underlaid with marketable minerals, it is not generally permissible to determine the value of a mineral deposit by estimating the number of tons in place and then multiplying the tonnage by a unit price per ton.

13. Eminent Domain Key 95, 107

A landowner is not entitled, at least within the framework of a condemnation suit, to be compensated for such consequential damages as loss of business, relocation expenses and the like.

14. Eminent Domain Key 96

Where consequential damages to landowner, including loss of clay and cost of restructuring its operation of the 48.10 acres that were left to it after taking did not result from the taking but from the landowner's decision to continue to mine clay from the remaining tract and to do it in a certain way, damages were simply not compensable in condemnation proceeding and evidence of them should have been entirely excluded.

15. Eminent Domain Key 136

In proceeding to determine just compensation for partial taking of 140-acre tract upon which landowner operated plant for manufacture of fire brick and other refractory items, district court committed serious error when it permitted an aggregation

of the estimated surface value of the 140 acres immediately prior to the taking and the landowner's estimated value of the clay underlying 20 of the 48.10 acres that were not taken, and in ignoring completely the surface value of the remaining 48.10 acres immediately after the taking.

16. Evidence Key 555

In proceeding to determine just compensation for partial taking of 140-acre tract, that was partially underlaid by soft clay deposit, trial court erred when it permitted the landowner's managerial personnel to make estimates of tonnage of clay in the ground and to multiply that tonnage by a fixed unit price; such approach was simply too speculative to be permissible.

17. Eminent Domain Key 202(1)

In proceeding to determine just compensation for partial taking of 140-acre tract a portion of which was underlaid with deposit of soft plastic clay that the landowner used in its manufacturing process, landowner was entitled to show that the deposit of clay could be mined more efficiently if the 91.9 acres that the Government took were available for utilization in connection with the mining operation; such evidence might well lead the jury permissibly to infer that, before the taking, a reasonable seller would ask more and a reasonable buyer would pay more on account of the clay deposit.

18. Eminent Domain Key 263

Though there was substantial competent evidence to justify jury in awarding landowner substantially more than the amounts testified to by the Government's value witnesses and though, had the case been submitted on admissible evidence and on adequate and proper instructions, award would probably have been af-

firmed without difficulty, where district judge fell into plain and fundamental error in connection with the evidence and in connection with instructions and where it was impossible to determine extent to which jury considered incompetent evidence or accepted an improper method of valuation in arriving at award that was approximately eight times what the Government was willing to pay, new trial was necessary whether or not the Government's trial counsel made timely objections to the errors.

19. Eminent Domain Key 122

Though a landowner whose property is taken in connection with an acquisition by the Government involving the expenditure of millions of dollars of public funds is entitled to just compensation, the landowner is not entitled to be enriched, nor is he entitled to be paid for items of damage that are not legally compensable.

20. Eminent Domain Key 221, 222(1)

In trying a condemnation action, federal district judge has an obligation to see to it that the landowner's claim is submitted to the jury on competent evidence and that the jury has proper legal guidelines for decision.

Maryann Walsh, Atty., Dept. of Justice, Washington, D.C., for appellant; James W. Moorman, Asst. Atty. Gen., Carl Strass, Attys., Dept. of Justice, Washington, D. C., on brief.

Jerome W. Seigfreid, Edwards, Seigfreid, Runge & Leonatti, Mexico, Mo., for appellees; Louis J. Leonatti, Mexico, Mo., on brief.

Before ROSS, Circuit Judge, MARKEY, Chief Judge,* and HENLEY, Circuit Judge.

HENLEY, Circuit Judge.

This is an appeal by the government in an eminent domain case from a judgment entered on a jury verdict returned in the United States District Court for the Eastern District of Missouri. The jury found that the owner of the property involved in the case was entitled to just compensation in the sum of \$245,966.00. The government had contended that the amount of just compensation that should be paid ranged between \$26,600.00 and \$31,200.00. A post-trial motion of the government for a new trial, or, alternatively, for a large remittitur having been denied, this appeal was timely filed.

For reversal, the government contends that the former owner of the property, C-E Refractories, a division of Combustion Engineering, Inc., hereinafter called "CE" or the "landowner," was permitted by the district court to pursue an improper route in establishing the amount of compensation that it should receive for the taking, and that improper evidence of value was admitted. CE denies that the government's position has merit, and in addition it asserts that counsel for the government failed to make and preserve a proper record in the district court, and,

* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

further, that in any event the error or errors, if any, of the district court were harmless and do not call for reversal.

The land directly involved in the case consists of 91.90 acres of land in Monroe County in the northern part of the Eastern District of Missouri. It was originally part of a larger tract of 140 acres of land that CE acquired when it merged with Walsh Refractories Corporation, a manufacturer of firebrick and other refractory products.¹ Prior to CE's acquisition the land had been owned by Walsh Refractories which had acquired it from a Mr. Lemley.

Walsh Refractories operated and CE still operates a plant for the manufacture of firebrick and other refractory items at Vandalia, Missouri, which is about forty miles from the property with which we are concerned. The property is located between Hannibal and Paris, Missouri, and apparently fronts on a county road in Monroe County.

A portion of the property is underlaid with a deposit of soft plastic clay which CE uses in its manufacturing process to beneficiate other clays that it uses. The clay deposit is located under twenty acres of the property. It appears to be undisputed that there is no clay under the remaining portions of the land.

The exploiting of a clay deposit involves strip mining in the course of which overburden has to be removed so as to expose the deposit; the over-all operation apparently produces pollutants of one kind or another including pollutants that can cause undesirable or dangerous impurities in streams.

In recent years strip miners have been substantially affected in their operations by federal and state legislation designed to protect and improve the natural environment, and strip miners have had to deal with federal and state regulatory agencies,

¹ Refractory materials used to line industrial kilns and furnaces consist of heat resistant clays and perhaps other ceramic materials.

one of which is the federal Environmental Protection Agency (EPA) and another of which is the Missouri Clean Water Commission. Missouri strip miners are now required to avoid stream pollution and to replace overburden that has been removed from mined areas.

On December 16, 1976 the government filed a complaint in condemnation and a declaration of taking whereby the government condemned a portion of the original 140 acre tract for use in connection with the Clarence Cannon Dam & Reservoir Project on the Salt River. The government condemned a little more than 87 acres of the land in fee, and it also imposed permanent flowage easements with respect to two ravines; those easements affected 4.9 acres of land. At the same time the government deposited in the registry of the district court the sum of \$22,750.00 as estimated just compensation for the over-all taking. On January 31, 1977 the district court signed an order authorizing the government, represented by the Army Corps of Engineers, to take possession of the property that had been condemned.

In February, 1977 the landowner filed an answer. In that pleading CE did not deny that the government had a right to take and condemn the lands and interests described in the complaint and declaration of taking, but it denied that the \$22,750.00 deposited in the registry of the district court was just compensation for the taking. CE prayed that just compensation be determined by reference to the highest and best use of the property, and CE demanded trial by jury.

While the land condemned, including the easements, amounted to 91.90 acres of land which left CE the owner of 48.10 acres, we find it convenient to refer to the property actually taken by the government as the "90 acre" tract and to the portion remaining to CE as the "50 acre" tract.

While it is undisputed that the clay deposit involved in the case is located on the 50 acre tract and that none of it is

located on the 90 acre tract, nevertheless the landowner took the position in the district court that it had used the entire 140 acre tract in connection with its extraction of the clay from the 50 acre tract.² And CE contended that its inability to make use of the 90 acre tract substantially diminished the value of the remaining 50 acres, and that for that reason CE was entitled to have "severance damage" included in its award of just compensation.

Although CE might have abandoned its clay mining operation following the taking and might have contended in the condemnation proceedings that the taking of the 90 acre tract rendered continued mining on the 50 acre tract unfeasible, CE determined to continue the operation, and a few weeks prior to the trial it formed a plan whereby the clay deposit could be mined without utilizing the 90 acre tract. The plan was an expensive one. It called for extensive and costly improvements on the 50 acre tract and it involved the loss of more than 44,000 tons of clay.

At the trial CE undertook to recover for the loss of the clay that its new plan entailed and also sought to recover the cost of the improvements that were called for by the plan.

The government contended that the taking of the 90 acres had not significantly damaged the remaining 50 acres, and that the plan developed by CE for continued mining of the clay was unnecessary and unreasonably expensive. The government also contended that the items in question should not be included in the jury's award of just compensation and that evidence as to them should not be admitted.

² It appears that overburden taken from the clay deposit was pushed by a bulldozer onto the 90 acre tract and was dumped principally into one or perhaps both of the ravines that have been mentioned. And CE claimed that there were additional advantages to owning the 90 acre tract as an adjunct to the 50 acre tract and particularly as an adjunct to the 20 acre tract where the clay was located.

In October, 1977 the case was the subject of a four day jury trial. CE called as witnesses Stig E. Scharthi, its plant superintendent at Vandalia; L. Verle Porter, its mining superintendent; Dr. Walter D. Keller of Columbia, Missouri, an eminent retired professor of geology; and Mr. Robert Turner who prior to his retirement had been a mining superintendent for A. P. Green Refractories which, according to Mr. Turner, is the largest manufacturer of refractory products in the world. CE also called as expert "value witnesses" four men qualified in general as real estate appraisers, but none of whom was a geologist and none of whom had any experience in making estimates of the value of clay deposits.

Prior to putting its value witnesses on the stand, counsel for CE had its earlier witnesses describe the property and describe the clay, its special qualities and its alleged scarcity which, according to Mr. Scharthi, amounted to uniqueness.

Mr. Scharthi and Mr. Porter were also permitted to testify as to the quantities of clay involved and to its per ton value, to describe the plan of CE and the cost thereof, and to describe how the plan would affect the mining of the clay deposit. Those witnesses agreed that as of the date of taking there were approximately 327,000 tons of clay in the ground of which 44,000 tons would be lost as a result of the plan being put into operation.³ Mr. Scharthi testified that the value of the clay in the ground was \$1.95 per ton which included an extra ten cents for the alleged "uniqueness" of the material. Scharthi came up with a final figure of \$540,097.21, including the value of the 90 acre tract which he considered to be about \$1,000.00 per acre.

³ As above stated, the date of taking disclosed by the record was December 16, 1976, and the plan in question was not devised until shortly before the commencement of the trial on October 13, 1977. Thus, it may be doubted that the plan had been implemented to any substantial extent during the trial period.

The testimony of Porter was essentially the same as that of Scharthi; however, his valuation of the clay in place was \$1.85 per ton. But, his final figure was somewhat higher than Scharthi's figure.

Those figures were turned over to the appraiser witnesses and were accepted by them in forming and expressing their ultimate opinions as to the amount of compensation CE was entitled to receive on account of the partial taking.

The first value witness called by the landowner was Wayne C. Miller. We need to consider his method of valuation in some detail because it incorporated CE's theory of just compensation in the case and because the other value witnesses called by CE used essentially the same method. Mr. Miller first valued the surface of the entire 140 acres of land immediately before the taking without regard to the minerals, and he placed that value at \$1,000.00 per acre or \$140,000.00. That valuation was based on a number of sales that he considered to be "comparable sales." He next accepted the tonnage figures on the clay that had been given him by Scharthi and Porter, and he accepted Porter's value of \$1.85 per ton; he also accepted the figures that had been given him with respect to the costs of CE's reconstruction of its operation. He added the sum of those figures to the \$140,000.00 surface value figures and came out with a total "before taking" figure, including "severance damage," of \$746,092.71. In coming to an "after taking" figure, Mr. Miller took no account of the surface value of the remaining 50 acres of land. He established the "after taking" value solely by reference to the alleged value of the clay in the ground, less the value of the 44,000 tons that would be lost as a result of CE's plan. His difference between the "before taking" and "after taking" values in question was \$546,929.56.

There was very little difference between Miller's final figure, and the final figures reached by the three other value witnesses.

Those figures were: Chester Young, \$547,731.56; Murray Colbert, \$547,731.56; and Darryl Ridgely, \$540,097.21. (Mr. Ridgely had given the 140 acres a surface value of \$925.00 per acre rather than \$1,000.00 per acre.)

At the conclusion of the testimony of Mr. Miller, counsel for the government advised the district court and opposing counsel in chambers that he was going to move to strike the testimony of all of the value witnesses of the landowner on the ground that they were taking an improper valuation approach, and that their testimony was incompetent. However, counsel stated that he was uncertain as to whether to move to strike the testimony of the witnesses one by one or to withhold his motion until all of them had testified. The trial judge stated that he preferred that government counsel wait until all of the value witnesses of CE had testified and then make his motion, and that in the meantime the government's rights would be preserved.

After the completion of the testimony of Mr. Ridgely CE rested, and the government promptly moved or renewed its motion to strike applying it this time to all of the landowner's value witnesses. The trial court overruled the motion, and the government proceeded to put on its case.

Government first called Dr. William J. Lang, a distinguished expert in the field of geology, including clays in general and fire clays in particular. Dr. Lang testified that there is no shortage of fireclay in the United States or in North Missouri, that there is no real difference between the clay on the 50 acre tract and other clays in the area, and that qualities of given clays can be changed rather easily. He did not consider that the taking of the 90 acre tract affected the clay on the 50 acre tract, and he thought that the plan of operation on that tract devised by CE was unnecessary and unreasonably expensive.

Dr. Lang also testified that in valuing a clay deposit you do not take an estimated tonnage in the ground and multiply it by a unit price per ton. He stated that the proper approach was to multiply an estimated tonnage in the ground by a royalty that the owner of the clay might expect to receive over the life of the deposit, and then reduce the expectation to present value. He was of the view that a reasonable royalty on the clay involved in the case was from twenty to twenty-five cents per ton.

Proceeding, Dr. Lang expressed the opinion that if there were some 327,000 tons of clay in the ground as of the date of taking, the maximum amount of tonnage that could be profitably extracted per year was 12,000 tons, and that the extraction process would cover a little more than 27 years. He calculated that the annual royalty received would be \$3,000.00, and that using a 10% rate of interest the present value of the royalty would be \$27,763.00. Asked to assume a royalty of seventy-five cents a ton, he expressed the opinion that the present value of the expectable royalty payments would be \$83,289.00. Those figures, of course, are very much lower than the figures resulting from a multiplication of tons in place by a unit value of each ton.

Dr. Lang's views were communicated to the value witnesses that the government expected to call, and they accepted those views just as the value witnesses called by CE had accepted the opinions and figures of Mr. Scharthi and Mr. Porter.

The government called two value witnesses, Tom McReynolds and Murray Kniffen.

Mr. McReynolds expressed the opinion that the difference between the value of the 140 acre tract immediately before the taking and the value of the 50 acre tract immediately after the taking was \$26,600.00. Mr. Kniffen was slightly more liberal and expressed an opinion that the difference between the

before taking and after taking values was \$31,200.00 Mc-Reynolds thought that the surface value of the land was \$300.00 per acre; Kniffen thought that it was \$350.00 per acre.

Neither of those two witnesses undertook to give the clay on the 50 acre tract any dollars and cents value. They did not do so because they had been advised directly or indirectly by Dr. Lang that the value of the clay had not been impaired by the taking of the 50 acre tract. What they did in this connection was to testify that the surface value of the original 140 acres was enhanced to the extent of "x" percent by the presence of the clay, and that the value of the remaining 50 acres was enhanced by the same "x" percent by the presence of the clay.

After the conclusion of the government's case the landowner put on some rebuttal testimony and then rested. At this stage counsel for the government moved for an instructed verdict within the range of the testimony of its witnesses. That motion was denied.

Both sides submitted requests for instructions which did not differ materially from the instructions that the trial judge actually gave, and there were no objections to the instructions that were given.

Having stated the case in some detail, it now becomes necessary to decide it.

I

[1] Where the government in the exercise of its power of eminent domain condemns for public use the property of a person, including a corporation, the fifth amendment to the Constitution provides that the property owner is entitled to just compensation for the property or estate taken.

[2] Just compensation is measured generally by the fair and reasonable market value of the property or interest taken, as of the date of taking, which in this instance is December 16, 1976.

Down through the years a number of principles to be applied in the determination of just compensation have become established; those principles have generally become pretty well understood by judges, lawyers and real estate appraisers. And ordinarily the application of those principles creates no problem in cases of taking of entire ownerships. However, more difficulty seems to be encountered in cases in which the government has taken only part of a single holding; while the solution to the problem is simple, it seems to be frequently missed. And, the difficulty seems to arise out of the concept of "severance damage."

[3] Where the government condemns only part of a single holding, just compensation is to be measured by the difference between the fair and reasonable market value of the entire ownership immediately before the taking and the fair and reasonable market value of the portion not taken immediately after the taking. Where the partial taking not only deprives the owner of the property that is actually taken but also diminishes the value of the property remaining to the owner, this diminution is often and "somewhat loosely," *United States v. Miller*, 317 U.S. 369, 376, 63 S.Ct. 276, 87 L.Ed. 336 (1943), referred to as "severance damage."

Problems in connection with the determination of just compensation in cases of partial takings have been discussed by this court in quite a number of cases including *United States v. 403.14 Acres of Land in St. Clair County, Mo.*, 553 F.2d 565 (8th Cir. 1977); *United States v. 1162.65 Acres of Land in Henry and St. Clair Counties, Mo.*, 498 F.2d 1298 (8th Cir. 1974); *United States v. 967,905 Acres of Land in Cook, et al.*

Counties, Minn., 447 F.2d 764 (8th Cir. 1971), *cert. denied*, 405 U.S. 974, 92 S.Ct. 1193, 31 L.Ed.2d 248 (1972); *United States v. Birnbach*, 400 F.2d 378 (8th Cir. 1968).

[4, 5] It is incorrect to think of "severance damage" as a separate and distinct item of just compensation apart from the difference between the market value of the entire tract immediately before the taking and the market value of the remainder immediately after the taking. In the case of a partial taking, if the "before and after" measure of compensation is properly submitted to the jury, there is no occasion for the lawyers or the trial court to talk about "severance damage" as such, and indeed it may be confusing to do so. *United States v. 403.14 Acres of Land in St. Clair County, Mo.*, *supra*, 553 F.2d at 567, n.2. The matter is taken care of automatically in the "before and after" submission.

[6] It is thoroughly established by the cases heretofore cited, including *United States v. Miller*, *supra*, one of the leading cases, that a landowner whose property is condemned in whole or in part is entitled to the full and perfect equivalent in money of the property or estate taken, which equivalent is, as indicated, measured by the concept of "fair and reasonable market value."

[7] The fair and reasonable market value of a tract of land is that price which a reasonable seller who desires to sell but is not required to sell would demand for the property and the price which a reasonable buyer who desired to buy but was not required to buy would pay for the same, assuming a reasonable time for negotiations and explorations of alternatives. That concept of market value was recognized by the trial court and by counsel on both sides in this case.

[8] The landowner is entitled to have the market value of his property determined by reference to the highest and best use for which it is available and for which it is plainly adapted,

and here the jury was justified in finding that the highest and best use of this property both before and after the taking was the mining of clay from the deposit underlying the 20 acres that have been mentioned.

[9] The landowner is also entitled to have the fact finder take into consideration all factors of value that would affect the market value of the property. From the landowner's standpoint, a factor of value would be anything that would induce a reasonable seller to demand more for the property and would induce a reasonable buyer to pay more on account of the existence of the value factor.

[10] It must be kept in mind, however, that the landowner is not entitled to have all factors affecting the value of his property added together and to have the total of the additions taken as the reasonable market value of his land. For example, improvements on a farm are an element or factor of value that must be considered in determining what the farm is worth on the market. But, it is firmly settled that one does not value the farmland as one factor and then value the improvements as another factor and then add the two values to determine market value. That is true because the value of the improved property may be greater than, equal to, or even less than the property in its unimproved state.

[11, 12] In the case of land that is underlaid with marketable minerals, including plastic clay, the existence of those minerals is a factor of value to be considered in determining the market value of the property, but the landowner is not entitled to have the surface value of the land and the value of underlying minerals aggregated to determine market value. The value of the mineral deposit is to be considered only to the extent to which it goes into and affects the over-all market value of the property. And it is generally not permissible to determine the value of a mineral deposit by estimating the

number of tons in place and then multiplying the tonnage by a unit price per ton. See *United States v. 599.86 Acres of Land in Johnson and Logan Counties, Ark.*, 240 F.Supp. 563, 572-73 (W.D. Ark. 1965), *aff'd sub nom. Mills v. United States*, 363 F.2d 78 (8th Cir. 1966), and cases cited in both opinions.⁴ See also *United States v. 620 Acres of Land in Marion County, Ark.*, 101 F.Supp 686 (W.D. Ark. 1952),⁵ and the comprehensive set of instructions that were given by the late District Judge Harry J. Lemley in *United States v. 2,350.2 Acres of Land in Pike County, Ark.*, 10 F.R.D. 293, 309-20 (W.D. Ark.).⁶

[13] The taking of a tract of land or part of a tract by the government may not only deprive the landowner of his property but may also inflict upon him incidental or consequential damages. While the rule may appear unjust, it is well settled that the landowner is not entitled, at least within the framework of a condemnation suit, to be compensated for such consequential damages as loss of business, relocation expenses, and the like. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11-12, 69 S.Ct. 1434 3 L.Ed. 1765 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 281-86, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943); *United States v. 967.905 Acres of Land in Cook, et al. Counties, Minn., supra*, 447 F.2d at 768-69.

⁴ The opinion of the district court was written by then Chief, now Senior, District Judge John E. Miller of Fort Smith, Arkansas, who has had a great deal of experience in eminent domain litigation. The opinion of this court was written by Circuit Judge (now Mr. Justice) Blackmun. Those opinions contain good general reviews of the over-all law of just compensation in eminent domain cases.

⁵ That opinion was also written by Judge Miller.

⁶ The published opinion bears no date. However, the writer is reliably advised that the opinion was filed about 1950.

II

When the evidence in this case is viewed, as it must be, in the light most favorable to CE, we think that there was substantial competent evidence to justify the jury in making a before and after market value award substantially in excess of the amounts testified to by the government's value witnesses. And if the case had been submitted to the jury on admissible evidence and on adequate and proper instructions, including cautionary instructions as to what the jury could and could not consider in arriving at its verdict, we would in all probability affirm the judgment of the district court without difficulty.

Unfortunately, from our consideration of the over-all record in the case, we are forced to the conclusion that the trial judge fell into plain and fundamental error in connection with the evidence and in connection with instructions, and that a new trial must be had regardless of whether the government's trial counsel made timely and proper objections to the evidence introduced by CE and regardless of whether he requested proper instructions, including cautionary instructions, and regardless of the fact that he did not object to the instructions ultimately given by the trial court. In other words, we apply to this case the "plain error" rule that is available in exceptional cases in which a trial court has committed serious error that seriously affected the rights of the losing party. See *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976); *University City, Mo. v. Home Fire & Marine Ins. Co.*, 114 F.2d 288, 294-95 (8th Cir. 1940). See also the qualifying language that appears in 28 U.S.C. § 2111, Fed.R.Civ.P. 61, and Fed.R.Evid. 103(d), which deal with "harmless error." Reference is made also to the discussion appearing in 11 Wright & Miller, *Federal Practice & Procedure*, §§ 2882 and 2883.⁷

⁷ The question of whether the government's trial counsel made a proper record in the course of the trial is sharply disputed. We find it unnecessary to decide the question. We do think that in the matter of objections to evidence and in the matter of instructions government counsel should perhaps have been more specific and more insistent in making the government's positions clear to the trial court.

[14] The initial error committed was in permitting CE to introduce evidence going to establish its consequential damages, including loss of clay and the cost of restructuring its operation on the 50 acre tract. Those damages did not result from the taking but from CE's decision to continue to mine clay from the 50 acre tract and to do it in a certain way. Those damages were simply not compensable in this case, and evidence of them should have been excluded totally.

[15] We think that additional serious error was committed when the district court permitted an aggregation of the estimated surface value of the 140 acres immediately prior to the taking and CE's estimated value of the clay underlying 20 of the 50 acres of land that were not taken, and in ignoring completely the surface value of the remaining 50 acres of land immediately after the taking.

[16] We think also that the trial court erred when it permitted CE's managerial personnel, Mr. Scharthi and Mr. Porter, to make estimates of tonnage of clay in the ground and then multiply that tonnage by a fixed unit price. Such an approach is simply too speculative to be permissible. See Mr. Justice Blackmun's discussion in *Mills v. United States*, *supra*, 363 F.2d at 80-81; see also the other cases involving mineral deposits that have been cited.

[17] This does not mean that CE was not entitled to prove that its property was underlaid with clay, that the clay was valuable and that it enhanced the over-all value of the property. And CE was entitled to show that the deposit of clay could be mined more efficiently if the 90 acres that the government took were available for utilization in connection with the mining operation. Such evidence might well lead the jury permissibly to infer that before the taking a reasonable seller would ask more for the over-all property due to the clay deposit, and that a reasonable buyer would pay more on account

of the deposit; and a jury might permissibly infer that after the taking of the 90 acres the 50 remaining acres, including the 20 acres of clay, were worth less standing alone than they were worth as part of the larger original tract. But, we feel that the district court simply went too far in permitting the landowner to establish in the manner that has been described that the clay in the ground was worth over \$600,000.00 and then permitting that figure to be added to a \$1,000.00 per acre surface value of the property.

In any condemnation case it is quite likely that some questionable evidence will get into the record and that some items of evidence are admissible for limited purposes only. The problem frequently, if not generally, can be taken care of by cautionary instructions given at the time at which the evidence comes in or in the course of the final instructions given to the jury by the trial court, or by initial cautionary instructions followed by similar instructions in the court's final charge to the jury.

Unfortunately, the body of evidence in this case that we deem to have been inadmissible, or only conditionally admissible, was submitted without precautionary or limiting instructions, to a lay jury, the members of which could hardly be expected to be familiar with the technicalities of the law of eminent domain or to have knowledge of the proper method of determining just compensation in the case of a partial taking of lands, part of which were underlaid by a valuable clay deposit which was located on the part of the land that the government did not take.

[18] To the credit of the inherent intelligence and common sense of the jurors, the jury did not accept at face value the testimony of either side. It awarded somewhat less than half of the amount sought by the landowner, but it awarded about eight times what the government was willing to pay. It is im-

possible for us to tell, however, the extent to which the jury considered incompetent evidence or the extent to which it accepted the method of valuation put forward by CE.

This is not a case in which an award of just compensation has been made by a district judge after a bench trial with the judge making adequate findings of fact and drawing adequate conclusions of law, nor is it a case tried before a commission as authorized by Fed.R.Civ.P. 71A(h) with the commission preparing a report complying with the requirements of *United States v. Merz*, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964). In either of those situations this court would probably be able to tell the route that the fact finder followed in reaching an ultimate determination as to what would constitute just compensation for the taking. In this case it is not possible to follow the jury's line of reasoning or to know what evidence it accepted and what evidence it rejected, or what weight it gave to particular items of evidence.

It is true that as the trial proceeded counsel for the government did not request that limiting or cautionary instructions be given; it is also true that the instructions requested by him did not differ materially from those submitted on behalf of CE, and it is finally true that government counsel did not object to the instructions ultimately given by the district court and did not request any instructions particularly geared to the type of taking involved in this case. That, however, does not solve our problem as far as instructions are concerned.

The instructions that the district court gave to the jury were abstractly correct and would have been quite adequate in an uncomplicated case involving a partial taking of, say, agricultural land and where both sides had proceeded in the light of a correct understanding of the law. But, the instructions given in this case were inadequate in view of the nature of the case and the valuation problems that have been detailed.

[19] A case of this kind involves more than a mere clash of private interests in which a trial judge may feel himself free to permit the course of litigation to be charted by the opposing lawyers. Land acquisitions in connection with projects like the Cannon Dam involve the expenditure of millions of dollars of public funds. A landowner whose property is taken in connection with such an acquisition is entitled to just compensation, but he is not entitled to be enriched, and he is not entitled to be paid for items of damage that are not legally compensable.

[20] In trying a case of this kind, a federal district judge is under an independent obligation, at least to a reasonable extent, to see to it that the landowner's claim is submitted to the jury on competent evidence, and with the jury being given proper legal guidelines for decision.

That course was not followed in this case, and the judgment of the district court is reversed and the cause remanded for a new trial.

APPENDIX "B"

United States Court of Appeals
for the Eighth Circuit

77-1944

September Term, 1978

United States of America,	}	Appeal from the United States Dis- trict Court for the Eastern District of Missouri.
vs.		
91.90 Acres of Land, etc., et al.,		
Appellant, Appellee.		

Petition of appellees for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

December 11, 1978

APPENDIX "C"

United States Court of Appeals
for the Eighth Circuit

77-1944

September Term, 1978

United States of America,	}	Appeal from the United States Dis- trict Court for the Eastern District of Missouri.
vs.		
91.90 Acres of Land, etc., et al.,		
Appellant, Appellees.		

Petition of appellees for rehearing en banc filed in this appeal having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

December 6, 1978